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No. 212.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

THE UNITED STATES, *Petitioner*

v.

SEABOARD AIR LINE RAILROAD COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Seaboard Air Line Railroad Company, the respondent, respectfully represents that the petition for writ of certiorari filed by the Solicitor General presents an erroneous and unsubstantial question for review, is without merit and should be denied.

The Question Presented Is Erroneously Stated by the Petition.

The petition (p. 2) inaccurately states that the question involved is whether the jurisdictional limitation on suits in the Court of Claims (28 U. S. C. 2501) allows carriers up to six years within which to bring actions against the

United States *"for recovery of their charges,"* despite the limitation of two years contained in the Interstate Commerce Act.

This is an unwarranted broadening of the precise and far narrower issue involved in this case, namely, whether an action for mail pay, not common carrier charges, is governed by the six-year or by the two-year limitation.

Statutes Involved.

The petition makes no reference to the basic statute upon which the respondent's action in the Court of Claims was founded, viz., the Mail Pay Act of 1916, 39 Stat. 429-30; 39 U. S. C. Chap. 15, as amended by Section 321 of the Transportation Act of 1940.

Statement.

It is perhaps understandable that the petition addresses itself to an issue which is not actually presented by the record, since the Court of Claims (83 F. Supp. 1012; R. 24-28) failed to deal with the precise issue in its opinion, ignoring the special character of the claim presented.*

The opinion of the Court of Claims and the petition here, are grounded upon the plainly erroneous assumption that the services of the railroads in transportation of the mails are indistinguishable from their common carrier functions in the transportation of freight, and that their charges for both classes of service are based upon the Interstate Commerce Act. The decision of the Court of Claims, that the action for mail pay is limited only by the six-year provision of 28 U. S. C. 2501, is clearly correct, for reasons which that Court did not choose to state.

This action is not one for "a carrier's charges" within the meaning of Section 16 (3) (a) of the Interstate Com-

* The Government raised the limitation question in the Court below for the first time in its brief and the defendant dealt with the special character of a mail pay case in its reply brief.

merce Act. The railroads do not act as common carriers in transporting the mails.

In *A. T. & S. F. Railway* v. *U. S.*, 225 U. S. 640, 649, this Court said:

> "The company in carrying the mails was not handling freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect it was serving as an agency of the Government..."

And to the same effect, *C. B. & Q. Ry.* v. *Illinois Commerce Commission*, 82 F. Supp. 368, 378:

The obligation of the railroads to carry mail is not dependent upon the interstate character of the movement. It is imposed pursuant to the Postal Clause of the Constitution (Art. 1, Sec. 8, Cl. 7) and not under the Commerce Clause.

Congress has never dealt with the transportation of the mails as a part of the problem of the regulation of common carriers. The arrangements and compensation for carrying the mails were handled by the Postmaster General from the beginning of the railroad industry. The land grant statutes provided that as a condition to the grants the railroads agreed to carry the mail at compensation fixed by Congress. The Act of March 3, 1873 (R. S. Sec. 4002) provided for the periodic readjustment of mail pay by the Postmaster General under standards thereby established, and the Act of 1876 established mail compensation to land grant roads at 80 per cent of the compensation paid to others.

After the enactment of the Interstate Commerce Act in 1887, mail pay continued to be handled by the Postmaster General under the Act of 1873 until the Mail Pay Act of July 28, 1916, Chap. 261 (39 Stat. 429-30; 39 U. S. Code, Chap. 15) provided for determination of the compensation by the Interstate Commerce Commission.

N. Y., N. H. & H. Ry. v. *U. S.*, 251 U. S. 123;
Eastern Ry. v. *U. S.*, 129 U. S. 391.

The statutory regulation of the rates and practices of the railroads as common carriers, therefore, and the contractual arrangements for railroad services with respect to the mail were developed and carried along as parallel and entirely independent governmental functions. The Mail Pay Act of 1916 did not in any sense change this basic legislative policy.

The Mail Pay Act of 1916 is not a part of the Interstate Commerce Act and has never been regarded as such. The Mail Pay Act is carried in Title 39, Chapter 15, U. S. Code under the heading "The Postal Service." The authority given in the Mail Pay Act to the Interstate Commerce Commission to fix just compensation for the mandatory services rendered by the railroads in carrying the mails, and Sec. 321 of the Transportation Act of 1940, are in no sense attempts to incorporate the transportation of mail and payment therefor into the structure of common carrier regulation and tariff rates administered by the Commission under the Interstate Commerce Act. On the contrary, the compensation for mail service imposed upon the railroads is fixed pursuant to the requirements of the Fifth Amendment.

U. S. v. *New York Central* (1929) 279 U. S. 73, 78, 79.

The basic Mail Pay Act of 1916 and Section 321 of Part II of Title III of the Transportation Act of 1940 simply provided that the Interstate Commerce Commission, as an appropriate body having the necessary expert knowledge, should be used for an independent governmental purpose with respect to the mails. This is shown by the fact that Section 321 of the Transportation Act of 1940 was not enacted as an amendment to the Interstate Commerce Act. The Transportation Act of 1940 was generally known as the Omnibus Transportation Bill. In addition to amendments to the Interstate Commerce Act, it legislated with respect to a variety of subjects not directly related to the

Interstate Commerce Act. One of these subjects is Section 321 relating to increased pay for carrying the mails.

This Court clearly recognized the special status of mail pay in *U. S.* v. *Griffin* (1938), 303 U. S. 226, in which it held that an order of the Interstate Commerce Commission fixing rates of mail pay could not be reviewed under the Urgent Deficiencies Act, as are orders made under authority of the Interstate Commerce Act.

The opinion lists numerous statutes outside the Interstate Commerce Act imposing administrative duties upon the Commission:

> "Among the statutes delegating to the Commission administrative duties in addition to those which it performs under the Interstate Commerce Act are: Postal Service: Railway Mail Pay Act . . . "—303 U. S. at 235, n. 7.

Some of these statutes expressly provide for review under the Urgent Deficiencies Act, but the Court says that as to these:

> "The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers."—p. 237,

an entirely different function from action under the Mail Pay Act:

> "While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined by the Commission is, as in the Great Northern R. Co. Case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the quantum meruit for carrying the mail."—p. 237.

Finally, the Court goes on to say that the Court of Claims has jurisdiction of suits involving mail pay under the Tucker Act:

"The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review... The Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress...

"And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory."—p. 238.

Since the petition, therefore, is addressed to a broader issue than is actually presented by this record, it is not deemed necessary to indulge in an academic discussion of the decision of the Court of Claims in *Southern Pacific Co.* v. *U. S.*, 62 Ct. Cls. 391, now sought to be reviewed for the first time after the lapse of 23 years, during which it was not questioned.

It might be pointed out, however, that another rather obvious basis for the decision below lies in the language of Section 16 (3) (a), here sought to be applied to an action in the Court of Claims.

Section 16 (3) (a) applies to "All actions at law by carriers subject to this chapter..." A suit under the Tucker Act, either in the Court of Claims or in a District Court, is not an "action at law."

McElrath v. *U. S.*, 102 U. S. 426, 440;
Ex Parte Bakelite Corp., 279 U. S. 438, 449, 452-453;
Williams v. *U. S.*, 289 U. S. 553, 573, 580-581;
Conners v. *U. S.*, 141 Fed. 16;
Lynn v. *U. S.* (1940) 110 Fed. (2d) 586.

Conclusion.

This case involves, on the record, no question of any substantial importance beyond the particular facts and parties concerned. The Solicitor General refers (pp. 15-16)

to a number of pending cases involving actions for common carrier charges under the Interstate Commerce Act, but so far as is known there are only two cases pending for the recovery of mail pay and they involve very small amounts. The minor claim involved in this case, which the Government does not now dispute on the merits, arose out of the unique and temporary situation created by the release provisions of Section 321 of the Transportation Act of 1940. Respondent is aware of only one other litigated controversy arising under that Act—*Southern Pacific Co. v. U. S.*, 107 Ct. Cl. 513, 69 F. Supp. 211; certiorari denied, 322 U. S. 757. Certainly now any other such claims would be barred by the six-year statute.

Since the decision of the Court of Claims should be sustained for the reasons herein stated, it is unnecessary to consider or determine the sole ground for review advanced by the Solicitor General. It will be time enough for this Court to consider issues not presented by this record when a proper record in cases now pending comes before it. It is respectfully submitted that the petition should be denied.

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